



January 28, 2016

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25;
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM 10593

Dear Ms. Dortch:

On behalf of the Ad Hoc Telecommunications User Committee (“Ad Hoc”), I hereby submit the redacted version of Ad Hoc’s comments and the accompanying declaration of its expert economic consultant in response to the Commission’s Further Notice of Proposed Rulemaking released on December 18, 2012 in the above-referenced proceeding.¹ These redacted materials are being submitted pursuant to the terms of the Modified Protective Order,² Second Protective Order,³ and Data Collection Protective Order⁴ effective in this proceeding.

Pursuant to the procedures outlined in the Data Collection Protective Order, two copies of the original, Highly Confidential version of this submission have been submitted to Mr. Christopher Koves in the Pricing Policy Division of the Wireline Competition Bureau under separate cover.

Please contact me at (202) 857-2576 or adelgado@lb3law.com if you have any questions regarding this submission.

¹ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318 (2012).

² *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Modified Protective Order, 25 FCC Rcd. 15168 (2010).

³ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Second Protective Order, 25 FCC Rcd. 17725 (2010).

⁴ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Data Collection Protective Order, 29 FCC Rcd. 11657 (2014) (“Data Collection Protective Order”); see also *Wireline Competition Bureau Now Receiving Acknowledgments of Confidentiality Pursuant to Special Access Data Collection Protective Order*, Public Notice, 30 FCC Rcd. 6421 (2015).



Sincerely,

A handwritten signature in blue ink that reads "Amanda J. Delgado".

Amanda J. Delgado
Legal Assistant
Levine, Blaszak, Block & Boothby, LLP

Attachments

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Special Access Rates for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
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AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

**COMMENTS OF
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

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Filed: January 28, 2016

Summary

The data collected by the Commission in this proceeding confirm what nearly all parties other than the ILECs have been reporting (and what the overwhelming weight of record evidence in this docket has already demonstrated) for many years: there is not enough competition in the special access market to justify the Commission's "pricing flexibility" rules for the ILECs' TDM services or to justify regulatory forbearance for their non-TDM services.

From the perspective of enterprise customers like the members of Ad Hoc, the data raises four key issues that the Commission must address.

First, the data confirm that the special access market is still dominated by the ILECs, contrary to the market assessments filed in this record by AT&T, Verizon, and other ILECs. The data have thus exposed years of misrepresentations by the ILECs regarding the competitive state of this marketplace. While a party might be excused for an occasional self-serving spin on the facts, the sheer scale and frequency of the ILECs' factual misrepresentations in this docket are too great, the importance of these services to the national economy too high, and the damage to businesses that have been over-charged and under-served too much for the FCC to ignore. The credibility of ILECs like AT&T and Verizon, and the "evidence" they purported to submit in this proceeding for more than a decade, have been thoroughly debunked by the data. Accordingly, the Commission must give little or no probative weight to the ILECs' arguments and factual representations as it completes its work in this proceeding by revising the rules and identifying appropriate protections for competition and end users.

Second, the Commission's misplaced confidence in the integrity of ILEC claims

regarding competition resulted in the Commission's premature grants of pricing flexibility for certain TDM services. The ILECs exploited the lack of competitive alternatives by raising prices for TDM services in the supposedly competitive geographic areas that qualified for pricing flexibility. The Commission must take steps to eliminate unjust and unreasonable rate increases for those services.

Third, the Commission must reject suggestions that the scope of this proceeding is limited to a revision of the "competitive triggers" in the pricing flexibility rules. The Commission's Notice of Proposed Rulemaking for this proceeding identified a far broader range of issues and potential remedies. At a minimum, the Commission must undo the damage done by the ILECs' exploitation of the pricing flexibility rules, which the Commission repudiated nearly four years ago. The Commission must order immediate interim relief for customers by re-setting the ILECs' inflated prices in geographic areas still subject to pricing flexibility at the levels charged by ILECs in price caps areas, pending a comprehensive update of the price caps rules.

Finally, the data require the Commission to re-visit the decisions by prior Commissions to forbear from regulating certain non-TDM services, particularly certain Ethernet services, on the basis of speculation and predictions regarding the emergence of competition. The data demonstrate that those decisions were misguided and unjustifiable in light of actual marketplace conditions. The ILECs' emphatic misrepresentations to this Commission regarding the extent of competition in the special access market included repeated claims that packet switching technology somehow eliminates the entry barriers and other brute economic realities that have impeded the development of facility-based competition for special access – as if by insisting it was

so, the ILECs could make it so. Like TDM services, however, Ethernet and other packet services use the installed base of legacy infrastructure for which ILECs are the dominant providers. While the ILECs apparently failed to respond initially to demand for Ethernet from customers seeking speeds higher than DS1 but lower than DS3, the data reveals that the ILECs can and have overcome their initial failure to deploy Ethernet rapidly enough to capture substantial demand. The data collection confirms that the ILEC claims of underdog status compared to new Ethernet competitors are specious and do not justify Ethernet forbearance.

TABLE OF CONTENTS

I. DISCUSSION	2
A. The Data Directly Contradict ILEC Claims that the Special Access Market is Competitive and Demand for TDM Services is Shrinking	2
B. The Data Confirms That Premature Pricing Flexibility And Forbearance Resulted In Substantial Rate Increases	11
C. The Data Reveals The Need For Immediate Interim Rate Relief, Pending Final Action In The Rulemaking	12
D. The Data Confirm that Ethernet is Just Another Bandwidth Option in a Market With Entry Barriers and Should be Regulated Accordingly	14
II. CONCLUSION.....	17

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**COMMENTS OF
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (“Ad Hoc”) hereby responds to the 2012 Further Notice of Proposed Rulemaking (“FNPRM”) ¹ and December 21, 2015 Public Notice² in the dockets captioned above. For reasons discussed in greater detail below, the data collected by the Commission pursuant to the FNPRM confirm what has already been demonstrated by the extensive record in this long-standing proceeding: there is insufficient competition in the special access market to ensure just

¹ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012).

² *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order, DA 12-1473 (rel. Dec. 21, 2015).

and reasonable rates, terms, and conditions under the Commission's pricing flexibility rules (which the Commission properly repudiated in 2012³) or under the regulatory forbearance granted to incumbent local exchange carriers ("ILECs") for certain packet-switched services.⁴

I. DISCUSSION

A. The Data Directly Contradict ILEC Claims that the Special Access Market is Competitive and Demand for TDM Services is Shrinking

For over a decade, the ILECs have insisted that they face robust competition for the provision of special access services which makes Commission regulation of that market unnecessary. More recently, they have added the claim that regulation is no longer necessary for time division multiplexed ("TDM") services such as DS1 and DS3 connections because consumers are rapidly abandoning those services in favor of Ethernet and other packet-switched services.

The data prove that those claims have never been true.

³ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557 (2012) ("Pricing Flexibility Suspension Order").

⁴ *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (2004); *Petition of the Embarq Local Operating Companies for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements*, *Petition of the Frontier and Citizens ILECs for Forbearance under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008); *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 14-9, Order, 29 FCC Rcd 13746 (2014).

As to special access competition generally, the ILECs have repeatedly asserted that it is pervasive and intense. AT&T, for example, claimed to have demonstrated in 2005 that it faced “substantial and growing actual and potential special access competition” from competitive local exchange carriers (“CLECs”) that “constrain AT&T’s prices even in areas where they have not yet deployed facilities.”⁵ In 2007, AT&T claimed that “competitive fiber blankets the downtown areas and other commercial centers where special access demand is heavily concentrated and, indeed, is already connected to or very near the buildings that account for the bulk of price cap LEC special access sales.”⁶ By 2009, AT&T maintained that the contention “that incumbent LECs are ‘free of competition’ for special access services in the ‘vast majority’ of commercial buildings” is “simply false.”⁷ According to AT&T, “AT&T, Verizon, Qwest, Embarq, and others have provided detailed internal data, analyses, maps, *and sworn testimony* that meticulously document the intense and growing competition they face.”⁸

Similarly, Verizon claimed in 2005 that an “explosion of alternative providers of high-capacity services” meant that “Verizon faces tremendous competition in efforts to keep wholesale special access customers on its network and to win the retail business of enterprise customers.”⁹ By 2007, Verizon claimed that “extensive competition for high capacity services make[s] increased regulation of ILEC special access services

⁵ Supplemental Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 8-9 (filed Aug. 8, 2007) (“AT&T Supplemental Comments Aug. 8, 2007”).

⁶ Supplemental Reply Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 7 (filed Aug. 15, 2007).

⁷ Letter from Robert W. Quinn, Jr., AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 3 (February 6, 2009) (“AT&T Letter Feb. 6, 2009”).

⁸ *Id.* (emphasis added).

⁹ Comments of Verizon, WC Docket No. 05-25, at 8 (filed June 13, 2005).

unwarranted”¹⁰ and by 2009, Verizon even urged the Commission to “close this proceeding based on ample evidence in the record demonstrating that there is extensive competition to provide high-capacity services.”¹¹ Indeed, Verizon claimed in 2013 that “[t]he enterprise broadband services marketplace continues to be robustly competitive and is growing more so, just as the Commission predicted in the Forbearance Orders.”¹²

The data collected by the Commission reveal that these claims were untrue. The special access market is still dominated by the ILECs, contradicting virtually all of the factual showings and market assessments filed on the record by AT&T, Verizon, and other ILECs for over a decade.

Attached to these comments is a declaration from Susan M. Gately (“Gately Declaration”), Ad Hoc’s expert economic consultant. The Gately Declaration summarizes the results of Ms. Gately’s analysis of the data set collected by the Commission in this proceeding. As the Gately Declaration explains, ILECs are unquestionably the dominant providers of special access, by any measure. The data regarding facilities-based connections to buildings and towers and revenues generated from the sales of special access services establish that the ILECs continue to provide the preponderance of these services. Most customers – be they other wireline carriers

¹⁰ Letter from Donna M. Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (filed Sept. 14, 2007).

¹¹ Letter from Donna M. Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed May 7, 2009); Letter from Donna M. Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed May 19, 2009); Letter from Donna M. Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed May 22, 2009).

¹² Reply Comments of Verizon and Verizon Wireless, WC Docket No. 05-25, RM-10593, at 1 (filed May 31, 2013).

(including wireline CLECs and interexchange carriers), mobile wireless carriers, or end users – have but one provider to choose from at the location(s) where they need to buy service and that one provider is the ILEC.

The ILECs are, for example, the only providers of facilities to a whopping ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** [REDACTED] ***END HIGHLY CONFIDENTIAL INFORMATION*** of the roughly ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** [REDACTED] ***END HIGHLY CONFIDENTIAL INFORMATION*** locations with special access demand, meaning that, contrary to AT&T's claim, ILECs are indeed “free of competition” from CLEC facilities at the vast majority of commercial buildings.¹³ The ILECs’ claim that CLEC fiber facilities “blanket” downtown areas and other centers of special access demand also turns out to be false. The data reveals that CLECs have customers in only ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** [REDACTED] ***END HIGHLY CONFIDENTIAL INFORMATION*** of the more than ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** [REDACTED] ***END HIGHLY CONFIDENTIAL INFORMATION*** census blocks through which CLEC fiber, run, a tiny percentage that includes CLECs that are dependent upon ILEC unbundled network elements (“UNEs”) rather than their own facilities.¹⁴ Moreover, these figures include both commercial buildings and wireless transmitter locations which means that the addressable base of enterprise customer locations to which ILECs provide service over their own facilities is even higher.¹⁵

¹³ Gately Declaration at para. 4.

¹⁴ Gately Declaration at para. 11.

¹⁵ Mobile wireless carrier purchaser data reveals that the ILEC share of wireless purchases is lower than for the totality of services. See Gately Declaration at Table 3.

The ILECs' share of special access revenues also demonstrates their overwhelming dominance of this market. For example, a mind-boggling ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** [REDACTED] ***END HIGHLY CONFIDENTIAL INFORMATION*** of the TDM circuit-based revenues from facilities owned by the provider are the ILECs'.¹⁶ Their share of revenues from non-TDM services provisioned via facilities owned by the provider is slightly lower, though it is still ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** [REDACTED] ***END HIGHLY CONFIDENTIAL INFORMATION***.¹⁷

The revenue data also debunk the ILECs' claims that they use CLECs wherever possible.¹⁸ In fact, the data reveals that the ILECs purchase the vast majority of their special access connections from other ILECs, including non-TDM Ethernet services. AT&T's wireless affiliate, for example, purchases a jaw-dropping ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** [REDACTED] ***END HIGHLY CONFIDENTIAL INFORMATION*** of its service from ILECs.¹⁹

Similarly, the revenue data reveals that the ILECs have been grossly misrepresenting the competitive impact of the limited CLEC entry that has occurred. In 2009, for example, AT&T claimed that "AT&T, Verizon, Qwest, Embarq, and others" had "meticulously document[ed]" a supposed "massive entry by competitors using new and existing technologies in both urban and suburban areas, in part to satisfy wireless carriers' exploding demand for wireless 'backhaul' connections caused by the data

¹⁶ Gately Declaration, Appendix A, Table 5.

¹⁷ *Id.*

¹⁸ See, e.g., AT&T Supplemental Comments Aug. 8, 2007 at 8-9..

¹⁹ Gately Declaration at para. 13.

demands of modern 3G and 4G wireless services.”²⁰ Similarly, Verizon claimed to have experienced an “explosion of alternative providers”²¹ in 2005 that had grown by 2009 into “intense competition” that was “only going to increase with the new demand for greater capacity that will result from the rollout of fourth generation wireless services.”²²

In fact, as revealed by the data collection, the “massive entry” by competitors did not stop the ILECs’ revenues from growing at an extremely healthy rate. From 2010-2013, AT&T’s ILEC revenue grew by ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***²³ and its combined revenues from its ILEC and CLEC operations grew by ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***²⁴. Verizon’s ILEC revenues grew by ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** and its combined ILEC and CLEC revenues grew by ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***.

Thus, the data collection makes clear that the ILECs’ repeated claims regarding the existence of robust special access competition are simply untrue. The data has exposed years of cynical misrepresentations and deceptive filings by the ILECs regarding the competitive state of this marketplace. While a party might be excused for

²⁰ AT&T Letter Feb. 6, 2009 at 3.

²¹ Verizon Comments June 13, 2005, WC Docket No. 05-25 at 8.

²² Letter from Donna M. Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed Nov. 4, 2009) (“Verizon Letter Nov. 4, 2009”).

²³ Gately Declaration, Appendix A, Table 2.

²⁴ *Id.*

an occasional self-serving spin on the facts, the sheer scale and frequency of the ILECs' factual misrepresentations in this docket are too great, the impact of these services on the national economy too huge, and the damage to businesses who have been over-charged and under-served too much for the FCC to ignore.

The ILECs' claims regarding customer migration from TDM to Ethernet turn out to be equally fictitious. For example, AT&T insisted not once but twice during the course of this proceeding that customers were no longer interested in purchasing TDM services. In 2010, AT&T claimed that the Commission was wasting time and resources on this proceeding because TDM services were "going the way of the dodo"²⁵ and did not merit investigation by the Commission. In 2012, AT&T insisted that a "sea change" in the special access marketplace had occurred in 2011,²⁶ though AT&T did not explain how that 2011 sea change could occur a year *after* AT&T had already reported a TDM extinction. In any case, AT&T's 2012 claim was that, in 2011, "many special access customers, and especially wireless carriers, made major, strategic commitments to a large-scale shift from TDM to Ethernet. *This irreversible shift to Ethernet became the overriding feature of the marketplace in 2011, and legacy TDM services have now entered a period of permanent decline.*"²⁷ Just as it is now doing, AT&T insisted that the data then collected by the Commission which contradicted its claim was stale; so much supposedly changed in a year that "the data the Commission has collected is already

²⁵ Comments of AT&T Inc., WC Docket No. 05-25, at 13 (filed Jan. 19, 2010) ("AT&T Comments Jan. 19, 2010").

²⁶ Letter from David L. Lawson, Sidley Austin LLP, counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (filed March 28, 2012) ("AT&T Letter March 28, 2012").

²⁷ *Id.* (emphasis added).

out of date.”²⁸ Verizon agreed, claiming that “[t]he marketplace for high-capacity services is changing rapidly” because it “is undergoing a fundamental shift away from TDM-based DS1 and DS3 special access services as customers look to newer technologies.”²⁹

These claims were also false. The special access data collected by the Commission reveals that during this very period – when AT&T and Verizon earnestly informed the Commission that customers were turning away from DS1 and DS3 services and that evidence before the Commission to the contrary was just stale – special access customers had in fact done *exactly the opposite*. According to the Commission’s preliminary analysis of the data collection, DS1 and DS3 channel termination sales in fact increased from 2010 to 2013. As the Commission pointed out in its recent *Tariff Investigation Order* ³⁰:

TDM-based special access services continue to be a significant part of the market for business data services. Initial data show that in 2013, TDM-based special access sales totaled approximately \$25 billion or about 60 percent of the total special access market of about \$40 billion. Other preliminary analysis of the data collection in conjunction with the Commission’s 2010 voluntary data collection shows that *for some of the largest price cap incumbent LECs, DS1 and DS3 channel termination sales actually increased from 2010 to 2013*. Additionally, Vertical Systems Group estimates that on the basis of total actual bandwidth delivered, use of legacy business services will remain stable at least through 2017.³¹

Even more remarkably, AT&T itself reported that, of the ***BEGIN HIGHLY

²⁸ *Id.* at 2 (emphasis added).

²⁹ Letter from Maggie McCready, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 5 (filed June 6, 2012) (“Verizon Letter June 6, 2012”).

³⁰ *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, Order Initiating Investigation and Designating Issues for Investigation, 30 FCC Rcd 11417 (2015) (“*Tariff Investigation Order*”).

³¹ *Id.* at para. 14 (emphasis added).

CONFIDENTIAL INFORMATION***[REDACTED]***END HIGHLY CONFIDENTIAL INFORMATION*** in special access services that AT&T's affiliates buy from AT&T ILECs, only a tiny ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***[REDACTED]***END HIGHLY CONFIDENTIAL INFORMATION*** is for packet services. In other words, an eye-popping ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***[REDACTED]***END HIGHLY CONFIDENTIAL INFORMATION*** of AT&T's interexchange and wireless affiliates' purchases of special access services were for the very TDM services that it claims are in a state of permanent decline.³²

The marketplace experience of Ad Hoc's members confirms the accuracy of the data collected by the Commission, not the "sea changes," "fundamental shifts," and "permanent declines" claimed by AT&T and Verizon. The Ad Hoc Committee challenged the carriers' claims at the time they were made, reporting to the Commission in 2012 that its members still relied heavily on TDM DS1/DS3 services and planned to do so for the foreseeable future. Members experienced no "blanket change" from TDM to Ethernet and described Ethernet as a product they would use as a more cost-effective intermediate capacity compared to DS3s for locations that outgrow DS1 capacity.

In short, the credibility of ILECs like AT&T and Verizon, and the "evidence" they relied on in this proceeding for more than a decade, has been thoroughly de-bunked by the data and exposed as untrue. Accordingly, as the Commission completes its work in this proceeding by revising the rules and identifying appropriate protections for

³² See "Explanatory Attachment accompanying AT&T's submission of data in response to data request, discussion of response to IIB10 and Table IIB10 alternate."

competition and end users, it must give little or no probative weight to the ILECs' arguments and factual proffers. They simply cannot be trusted to tell the truth.

B. The Data Confirms That Premature Pricing Flexibility And Forbearance Resulted In Substantial Rate Increases

The Commission's misplaced confidence in the integrity of ILEC claims regarding competition, combined with flaws in the pricing flexibility rules themselves, resulted in grants of pricing flexibility for certain TDM services even though they are provided in geographic areas that lack sufficient competition to constrain ILEC pricing. The data collection confirms that the ILECs have used the Commission's ill-advised grants of pricing flexibility to exploit their market power by charging higher prices for TDM services in the supposedly competitive geographic areas than the prices that apply in areas still subject to the price caps rules.

The carriers' own public tariff filings with this Commission have documented the carriers' higher prices in pricing flexibility areas.³³ In addition, Ad Hoc notes that the Commission allowed ILECs to increase special access rates *de facto* every time it granted a pricing flexibility petition that added geographic areas to the existing pool. This is because the ILECs created in their tariffs separate rate schedules for pricing flexibility areas.³⁴ Those rate schedules contain prices that are substantially higher than

³³ A compilation of representative filings was previously presented to the Commission by tw telecom inc. in an *ex parte* presentation. See Letter from Thomas Jones, Willkie, Farr, & Gallagher, LLP, Counsel to tw telecom, inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25; RM 10593 (filed June 18, 2012) ("tw Letter June 18, 2012") at Appendix B.

³⁴ See, e.g., AT&T's Pacific Bell Telephone Company Tariff F.C.C. No. 1, 9th Revised Page 31-2, § 31.2.A and B.

those in the rate schedules for areas subject to the FCC's price caps rules.³⁵ The gap between higher pricing flexibility rate schedules and price caps rate schedules has widened over time, in part because the ILECs have simply filed increases in their pricing flexibility schedules³⁶ and in part because the price caps rules were based for a time on general economic trends in the telecommunications industry which pushed down price caps indices and thus price caps rates. As a result, every pricing flexibility petition granted by the FCC raised prices for customers in the metropolitan areas covered by the petition because the customer was forced off of the price caps rate schedule and onto the higher pricing flexibility schedule instead.

**C. The Data Reveals The Need For Immediate Interim Rate Relief,
Pending Final Action In The Rulemaking**

The Commission must reject any suggestion that the appropriate scope of this proceeding is limited to an adjustment of the “competitive triggers” in the pricing flexibility rules.³⁷ The Commission’s Notice of Proposed Rulemaking for this proceeding informed interested parties that the Commission was considering a broad range of issues and potential remedies to protect special access customers from unreasonable rates, terms, and conditions. In response to the record evidence establishing that

³⁵ Cf. AT&T's Pacific Bell Telephone Company Tariff F.C.C. No. 1, 19th Revised Page 7-172, § 7.5.9(A) and Pacific Bell Telephone Company Tariff F.C.C. No. 1, 2nd Revised Page 31-57.3, § 31.5.2.7.1 (A).

³⁶ twt Letter June 18, 2012 ,note 33, *supra*.

³⁷ Cf. *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2004, paras. 22, 24, 25; 2006-18, paras. 60-68 (2005); *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 13618, 16352-54, paras. 80-90 (2012).

competitive forces are insufficient to protect ratepayers from harm and that ILECs have exploited the pricing flexibility rules and forbearance to raise their prices, the Commission must expeditiously undertake the next phase of this proceeding. Specifically, the FCC must substantially reform or eliminate its pricing flexibility rules, reverse forbearance in non-competitive markets, and update its price caps rules, including the development of an “X” factor based on a total factor productivity study.

Pending completion of that overhaul, however, the Commission must address, at a minimum, the damage done by the ILECs’ exploitation of the pricing flexibility rules, which the Commission repudiated nearly four years ago. The data collection demonstrates that the competition which supposedly justified the pricing flexibility rules simply failed to develop. Yet the ILECs were allowed to raise rates with impunity for many years while the rules were left in place by the Commission. Ratepayers need immediate interim relief from these excessive rates, pending more fulsome relief in this rulemaking. Interim relief is justified because the Commission already had sufficient evidence to conclude that the pricing flexibility rules were so fundamentally flawed that it suspended their continued operation.³⁸ To protect ratepayers from the continuing impact of those rules, FCC must undo the rate increases made by the ILECs while the discredited rules were in effect. Accordingly, the Commission must set rates in pricing flexibility areas at more reasonable levels by reducing them to levels comparable to those charged by ILECs in price caps areas, pending a comprehensive update of the price caps rules.

In an August 28, 2015 written *ex parte* presentation filed in this docket, a group of

³⁸ *Pricing Flexibility Suspension Order*, note 3, *supra*.

CLECs outlined a set of remedies, and rebutted specious arguments against them, that are more comprehensive than the interim relief described above.³⁹ Ad Hoc supports the approach described in the *ex parte* presentation but also urges the Commission to take immediate action with respect to rates in pricing flexibility areas. As described in the *ex parte*, the Commission has both the requisite authority and a variety of tools for doing so.

D. The Data Confirm that Ethernet is Just Another Bandwidth Option in a Market With Entry Barriers and Should be Regulated Accordingly

Reform of the Commission's Ethernet policies is particularly important for enterprise customers because the service plays a key cost management role when locations require more bandwidth. Ethernet speeds of 5, 10, 20, and 50 Mbps fill an important gap between 1.445 Mbps DS1 connections and 45 Mbps DS3 service, in terms of price as well as bandwidth speed. Customers move between all of these services as their bandwidth needs rise and fall. ILEC attempts to consider Ethernet services in isolation from TDM services that have higher and lower speeds are inconsistent with actual consumer demand. Ethernet is just another broadband option, not a separate product altogether. Accordingly, any assessment of the ILECs' market power over Ethernet services must analyze those services as merely one offering in a single product market for broadband access services.

At the time of their initial forbearance grants for certain packet-switched services,

³⁹ See Letter from Thomas Jones, Willkie, Farr, & Gallagher, LLP, on behalf of Birch Communications, Inc., BT Americas Inc., & Level 3 Communications LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed Aug. 28, 2015); see also Letter from Thomas Jones, Willkie, Farr, & Gallagher, LLP, on behalf of Birch Communications, Inc., BT Americas Inc., & Level 3 Communications LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed Nov. 9, 2015).

including Ethernet,⁴⁰ the ILECs characterized packet-based service as a technology so new and different from TDM transmission technology that it could magically transcend the entry barriers, scale economies, and other impediments to competition that the Commission and industry observers have long acknowledged to exist in the market for last mile services. Time has passed, packet-based services are becoming as commonplace as TDM-based services, and the magic has worn off. As AT&T said previously in this docket, “Ethernet is simply a service that can be provided over many different types of transport facilities, including copper, fiber, coaxial, and wireless facilities.”⁴¹

That is precisely the rub. The underlying transport facilities for Ethernet services are the same as the underlying transport facilities for TDM services. And those underlying transport facilities are the source of the ILECs’ market power in the special access marketplace. The “many different types” of last mile facilities used to provide Ethernet are the same facilities, subject to the same brute realities of economics and the physical world, as the facilities used to deliver TDM services. Regardless of the packet or TDM electronics at the end of a loop, last mile access service remains non-competitive because it requires high levels of sunk investment in transmission facilities, whether they are fiber or copper and whether the service running on them is analog or digital, packet or TDM. The Commission’s ill-advised forbearance from regulating Ethernet differentiates between Ethernet and TDM services for regulatory purposes when the underlying facilities and market failure are the same for both.

⁴⁰ See note 4, *supra*.

⁴¹ Reply Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 74 (Feb. 24, 2010) (“AT&T Reply Comments Feb. 24, 2010”).

In AT&T's comments on the petition to reverse Ethernet forbearance filed in this docket, AT&T downplayed the existence, much less the significance, of the joint and common input costs of ILEC TDM and Ethernet deployment. AT&T stated that "[t]here are no 'incumbent' Ethernet providers. Rather, all providers have developed and deployed these services from scratch."⁴² This claim ignores the substantial incumbency advantages enjoyed by the ILECs that apply to both TDM and Ethernet services alike. When the ILECs provide Ethernet service, they can make use of the same rights of way, trenches, conduit, wires, poles, building access, riser, truck rolls, employees, outside plant, central office equipment, administrative expenses, and other legacy inputs that they use when they provision TDM-based special access services.

AT&T is certainly correct that "as long as competitors can deploy their own underlying transport facilities or obtain them at just and reasonable price levels, competitors will be able to (as they already do today) effectively compete in the provision of Ethernet services."⁴³ That is what this proceeding must ensure – that competitors will be able to obtain the underlying transport for Ethernet from incumbents at just and reasonable price levels until such time as they can deploy their own facilities.

The data collection confirms that ILECs are successfully exploiting the advantages of incumbency to increase their Ethernet sales at a rapid pace. The data reveal that, in 2010, the Ethernet revenues of AT&T, Verizon, and CenturyLink accounted for only about ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***

⁴² Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 6 (Apr. 16, 2013) ("AT&T Comments Apr. 16, 2013").

⁴³ Reply Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 74 (Feb. 24, 2010) ("AT&T Reply Comments Feb. 24, 2010").

END HIGHLY CONFIDENTIAL INFORMATION, less than ***BEGIN
HIGHLY CONFIDENTIAL INFORMATION*** ***END HIGHLY CONFIDENTIAL
INFORMATION*** of total ILEC special access sales. By the end of 2013, however, the
ILECs Ethernet revenues had skyrocketed to ***BEGIN HIGHLY CONFIDENTIAL
INFORMATION*** ***END HIGHLY CONFIDENTIAL
INFORMATION***.⁴⁴

II. CONCLUSION

The data collected in this docket confirm what the overall record in this docket has indicated consistently since it was opened: the ILECs continue to dominate the market for last mile special access facilities, be they TDM or non-TDM. To protect consumers of these services with regulations that ensure just and reasonable rates,

⁴⁴ See Gately Declaration at Table 6.

terms, and conditions, the Commission should order immediate interim rate relief for services in pricing flexibility areas and reverse its forbearance decisions for non-TDM special access.

Respectfully submitted,

**AD HOC TELECOMMUNICATIONS
USERS COMMITTEE**

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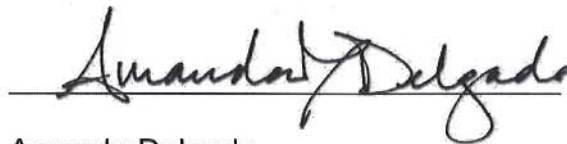
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Filed: January 28, 2016

Certificate of Service

I, Amanda Delgado, hereby certify that the original, Highly Confidential version of the preceding Comments of the Ad Hoc Telecommunications Users Committee was furnished to Christopher Koves, Pricing Policy Division, Wireline Competition Bureau, this 28th day of January, 2016 via hand delivery. The redacted version for public inspection was filed via ECFS.

A handwritten signature in black ink, reading "Amanda Delgado", written over a horizontal line.

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REDACTED - FOR PUBLIC INSPECTION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Special Access for Price Cap Local)	WC Docket No. 05-25
Exchange Carriers)	
)	
AT&T Corporation Petition for)	RM-10593
Rulemaking to Reform Regulation of)	
Incumbent Local Exchange Carrier)	
Rates for Interstate Special Access)	
Services)	

Declaration of

Susan M. Gately

On Behalf Of
Ad Hoc Telecommunications Users Committee

January 27, 2016

[Entirety of Declaration of Susan M. Gately Redacted]

